BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RHONDA S. LEE	)	
Claimant	)	
VS.	)	
	)	Docket No. 202,798
OK TRANSFER & STORAGE, INC.	)	
Respondent	)	
AND	)	
	)	
INSURANCE COMPANY OF NORTH AMERICA	)	
KANSAS TRANSPORTATION & INDUSTRY	)	
WAUSAU INSURANCE COMPANY	)	
CLARENDON INSURANCE COMPANY	)	
Insurance Carriers	)	

ORDER

Claimant and Insurance Company of North America (INA) appeal from an Award entered by then Assistant Director Brad E. Avery on October 23, 1997. The Appeals Board heard oral argument March 17, 1998.

APPEARANCES

Dale V. Slape of Wichita, Kansas, appeared on behalf of claimant. Richard J. Liby of Wichita, Kansas, appeared on behalf of INA. Lawrence D. Greenbaum of Kansas City, Kansas, appeared on behalf of Kansas Transportation & Industry. Christopher J. McCurdy of Wichita, Kansas, appeared on behalf of Wausau Insurance Company. Carolyn R. Wade of Kansas City, Missouri, appeared on behalf of Clarendon Insurance Company.

RECORD AND STIPULATIONS

The Appeals Board has considered the evidence listed in the Award as the record before the Assistant Director. In addition, the Appeals Board has reviewed and considered the deposition of claimant taken on February 17, 1997. Although the parties had stipulated that this deposition be part of the record, it appears it was not submitted to or considered by the Assistant Director. The parties to the appeals have provided a copy to the Board and have agreed that it should be considered by the Board as part of the record.

The parties have also stated for the record without dispute by any party that the respective periods of coverage by the successive insurance carriers were: (1) INA from

May 1, 1994 to May 1, 1995; (2) Kansas Transportation & Industry Self-Insurance Fund from May 1, 1995 through July 18, 1995; (3) Wausau Insurance Company from July 19, 1995, to March 3, 1996; and, (4) Clarendon Insurance Company from March 3, 1996, through the last day worked, June 19, 1996.

ISSUES

Claimant alleges she suffered simultaneous injury to both of her upper extremities for which she is entitled to a general body work disability. The Assistant Director found the left and right upper extremities were two separate accidents and, thus, two scheduled injuries. He awarded benefits for 16.02 percent for the upper right extremity with a November 7, 1994, date of accident, but found that the injury to the left upper extremity had not reached maximum medical improvement and was not ripe for award. Since INA was the insurance carrier on November 7, 1994, the date of the first accident, the Award required all benefits to be paid by INA.[1]

On appeal, the two issues are as follows:

1. Date of accident.
2. Nature and extent of disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board concludes the Award entered by the Assistant Director should be modified. The Board finds the evidence establishes two accidents, one November 7, 1994, and, the second, the last day of claimant's work, June 19, 1996. The first is a scheduled disability of 7 percent to the right upper extremity and the second is a general body disability of 23.5 percent.

Findings of Fact

1. Claimant worked for respondent from June 1, 1993, to June 19, 1996, moving residential households. Her duties included packing, carrying furniture onto and off of the truck, and taking inventory.

2. Claimant began having problems with her right elbow November 1993 and first reported the problem to her supervisor in May 1994. At that time, the symptoms were to the right upper extremity only.

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[1] The Board notes that Clarendon Insurance Company has, in its brief on appeal, argued that claimant gave no notice of injury to the left upper extremity and asks that benefits be denied on that basis. It appears, however, that this was not an issue raised before the Assistant Director and, therefore, is not an issue which will be considered on appeal.

3. Respondent authorized medical care and claimant first saw Dr. Paul D. Lesko in June 1994. Dr. Lesko diagnosed epicondylitis with mild carpal tunnel on the right. He initiated anti-inflammatory medication, icing, epitrain, and physical therapy. When claimant was not improving, he prescribed injections first to the elbow and later to the carpal tunnel. In September, Dr. Lesko ordered EMG studies. The tests showed a right median neuropathy at the wrist consistent with carpal tunnel. As a result, Dr. Lesko advised claimant surgery was indicated to release the carpal tunnel and the lateral epicondyle structures.

4. Claimant first noticed symptoms in the left upper extremity in September 1994. Dr. Lesko testified claimant mentioned the complaints to him at that time. But the EMG study in September 1994 was normal on the left.

5. After Dr. Lesko suggested surgery, claimant sought and obtained a second opinion from Dr. J. Mark Melhorn. Dr. Melhorn first saw claimant in November 1994. Dr. Melhorn reviewed the EMG done for Dr. Lesko. Based on the EMG studies and Dr. Melhorn's own examination, Dr. Melhorn diagnosed right carpal tunnel syndrome, right lateral epicondylitis, and left hand and wrist tendonitis. He took claimant off work in November 1994, and performed right carpal tunnel release and right lateral epicondylectomy with conjoined tendon release on January 30, 1995. Dr. Melhorn released claimant to return to work in March 1995. He rated claimant's functional impairment as 7.05 percent to the right arm and imposed restrictions limiting claimant to light medium work:

> . . . defined by OSHA as 35 lbs maximum lift/carry, 20 lbs frequent, repetitive tasks of grasping, pushing, pulling, and fine manipulation 6 hours or less per 8, and task rotation.

Dr. Melhorn found no functional impairment to the left upper extremity. Dr. Melhorn generally agreed with the opinion of Ms. Karen C. Terrill that claimant has lost the ability to perform 19 percent of the tasks she performed at work in the 15 years before this injury.

6. When claimant returned to her work in March 1995, her duties remained the same and her symptoms worsened bilaterally. Respondent terminated her effective June 19, 1996. The termination letter, delivered with her check, stated that her work performance, both speed and volume, were not up to company standards.

7. At the time of the regular hearing, claimant worked for ITI Telemarketing. She had been hired on December 23, 1996, and was working approximately 20 hours per week at $5.50 per hour. She hoped her hours would be increased to 40 per week.

8. Claimant returned to Dr. Lesko for an evaluation in February 1996. In addition to the status post carpal tunnel release on the right and lateral release at the elbow on the right, Dr. Lesko noted claimant was getting similar carpal tunnel-like symptoms on the left. Dr. Lesko rated the impairment as 20 percent of the upper extremity for the carpal tunnel on the right and 10 to 12 percent to the upper extremity for the lateral release. He also

rated the left side upper extremity as approximately 12 percent. In his deposition, Dr. Lesko combined these ratings to arrive at a body as a whole rating of 19 percent. Dr. Lesko was shown reports from vocational experts Jerry D. Hardin and Karen C. Terrill listing the tasks claimant had performed during the 15 years before the current accident. Reports from both experts arrived at conclusions about which tasks claimant cannot now perform. As to both, he stated he would not have any reason to agree or disagree.

9. Dr. Pedro A. Murati performed an independent medical evaluation. He examined the claimant April 17, 1997. In addition to the right carpal tunnel and right epicondylitis, both status post surgery, he diagnosed probable bilateral ulnar cubital syndrome, not at maximum medical improvement, and probable left carpal tunnel syndrome, also not at maximum medical improvement. He recommended repeat nerve conduction studies. In the absence of such studies, he rated the claimant's impairment as 16 percent of the whole body, a rating which included 19 percent impairment to the right upper extremity and 10 percent impairment to the left upper extremity. He recommended that claimant perform only very occasional repetitive work with the right and occasional with the left, lift occasionally to 20 pounds, frequently to 10 pounds, and constantly to 5 pounds. Dr. Murati reviewed the task list prepared by Mr. Hardin and agreed with Mr. Hardin's opinion about which tasks claimant could and could not perform. This opinion indicated claimant cannot now perform 65 percent of the tasks she performed in the 15 years before the current injury.

10. Dr. Murati testified that additional testing and treatment for the left upper extremity would probably alter her impairment rating substantially. He also testified that if claimant receives no additional treatment, the restrictions he recommended would be permanent and the impairment ratings would not change.

Conclusions of Law

1. Claimant has the burden of proving her right to an award of compensation and of proving the various conditions on which that right depends. K.S.A. 44-501(a).

2. K.S.A. 44-510d provides a list of the maximum number of weeks of benefits for certain injuries referred to as scheduled injuries.

3. The Board finds, from the evidence, a permanent impairment to claimant's right upper extremity of 7 percent as of November 7, 1994, when she left work for surgery. This finding is based on Dr. Melhorn's impairment rating. As indicated below, the Board has found that claimant suffered additional injury after she returned to work in March 1995. The impairment ratings by Dr. Lesko and Dr. Murati were given after she returned to work and would necessarily include that additional impairment. For this reason, the Board has relied on the rating by Dr. Melhorn.

4. The Board finds, as did the ALJ, November 7, 1994, as the date of accident of this injury on the basis of *Berry v. Boeing Military Airplanes*, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994) and *Durham v. Cessna Aircraft Co.*, 24 Kan. App. 2d 334, 945 P.2d 8 (1997).

5. The Board finds claimant had no permanent impairment to the left upper extremity as of November 7, 1994. Although claimant had made complaints of symptoms to the left as of September 1994, the EMG was normal on the left and there is otherwise no evidence of a permanent impairment.

6. The Board finds that after claimant returned to work in March 1995, she suffered additional injury bilaterally. This conclusion is based not only on claimant's testimony of worsening symptoms bilaterally but also on the opinions of Dr. Lesko and Dr. Murati who gave impairment ratings for injuries to both the left and right upper extremities.

7. The Board finds claimant suffered a second general body injury after she returned to work in March 1995 and that the date of accident for this second injury is June 19, 1996, the last date worked. Although claimant was terminated for poor performance, not directly because of the injury, the record indicates her repetitive trauma injury worsened to the last day worked. That date is, therefore, used as the date of accident.

8. The Board finds claimant is entitled to a work disability for the general body injury of June 19, 1996. Again, the Board notes claimant was terminated for poor performance. In some cases that fact rules out work disability following the termination. This is true at least where claimant can perform an unaccommodated job after his/her injury. *Watkins v. Food Barn Stores, Inc.* 23 Kan. App. 2d 837, 936 P.2d 294 (1997). But the record shows claimant's injury left her with restrictions which made it inappropriate for her to do the job she was doing for respondent. Under these circumstances, the Board concludes claimant should receive a work disability commensurate with the injury suffered.

9. K.S.A. 1996 Supp. 44-510e(a) defines work disability as the average of the wage loss and task loss:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

10. K.S.A. 1996 Supp. 44-510e also specifies that a claimant is not entitled to disability compensation in excess of the functional impairment so long as the claimant earns a wage which is equal to 90 percent or more of the preinjury average weekly wage.

11. The wage prong of the work disability calculation is based on the actual wage loss only if claimant has shown good faith efforts at employment after the injury. Claimant may not, for example, refuse to accept a reasonable offer for accommodated work. If the claimant refuses to even attempt such work, the wage of the accommodated job may be imputed to the claimant in the work disability calculation. *Foulk v. Colonial Terrace*, 20 Kan.

App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995). Even if no work is offered, claimant must show he/she made a good faith effort to find employment. If the claimant does not do so, a wage will be imputed to claimant based on what claimant should be able to earn. *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

12. In this case, claimant did obtain employment after the June 1996 injury at $5.50 per hour. Even though she was initially working less than 40 hours per week, she hoped to be working 40 hours per week and there were no restrictions which would prevent her from doing so. The Board therefore imputes to claimant, for purposes of calculating the wage loss, $5.50 per hour for 40 hours per week, or $220 per week. This represents a 13 percent wage loss when compared to the stipulated preinjury wage of $254.20 per week.

13. The Board also finds claimant has a 42 percent loss of ability to perform tasks. This conclusion gives equal weight to the opinions of Dr. Melhorn (19 percent) and Dr. Murati (65 percent). Dr. Lesko's testimony was considered but it appears he did not give what could be described as his opinion. He stated he had no reason to agree or disagree with the opinions of either Karen Terrill or Jerry Hardin. The Board therefore has given weight only to the opinions of Dr. Melhorn and Dr. Murati.

14. For the June 19, 1996 accident, the Board finds claimant has a 27.5 percent work disability based on a 42 percent task loss and a 13 percent wage loss. K.S.A. 44-510e.

15. K.S.A. 44-501 provides that the disability awarded must be reduced by the extent of any preexisting functional impairment:

> The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.

16. Based on Table 3 in the musculoskeletal system section of the AMA *Guides to the Evaluation of Permanent Impairment* (Fourth Edition) 7 percent of the upper extremity, the impairment the Board has found existed from the November 7, 1994, injury, converts to 4 percent of the whole body. And under K.S.A. 44-501, the 4 percent must be deducted from the 27.5 percent work disability. The Board, therefore, finds claimant is entitled to benefits based on a 23.5 percent disability for the accident of June 19, 1996.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered on October 23, 1997, by then Assistant Director Brad E. Avery, should be, and the same is hereby modified.

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Rhonda S. Lee, and against the respondent, OK Transfer & Storage, and its insurance carrier, Insurance Company of North America, for an accidental injury which occurred November 7, 1994, and based upon an average weekly wage of $254.20, for 14.86 weeks of temporary total disability compensation at the rate of $169.48 per week or $2,518.47, followed by 13.66 weeks at the rate of $169.48 per week or $2,315.10 for a 7% scheduled injury, making a total award of $4,833.57, all of which is presently due and owing, less amounts previously paid.

WHEREFORE AN AWARD OF COMPENSATION IS ALSO HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Rhonda S. Lee, and against the respondent, OK Transfer & Storage, and its insurance carrier, Clarendon Insurance Company, for an accidental injury which occurred June 19, 1996, and based upon an average weekly wage of $254.20, for 97.53 weeks at the rate of $169.48 per week or $16,529.38 for a 23.5% permanent partial disability, all of which is presently due and owing, less amounts previously paid.

The Appeals Board also approves and adopts all other orders entered by the Award not inconsistent herewith.

IT IS SO ORDERED.

Dated this _____ day of October 1998.

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BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: Dale V. Slape, Wichita, KS
Richard J. Liby, Wichita, KS
Lawrence D. Greenbaum, Kansas City, KS
Christopher J. McCurdy, Wichita, KS
Carolyn R. Wade, Kansas City, MO
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Director